UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

April 8, 1997

UNITED STATES OF AMERICA Complainant,	))	8 U.S.C. 1324a Proceeding
v.	)	OCAHO Case No. 96A00077
COCOA ENTERPRISES CORP. Respondent.	))	

FINAL DECISION AND ORDER OF JUDGMENT BY DEFAULT AND ORDER GRANTING THE MOTION OF EDWARD J. TIGHE TO WITHDRAW AS COUNSEL

I. PROCEDURAL HISTORY

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. 1324a, (INA) in which the United States Department of Justice, Immigration and Naturalization Service (INS) is the complainant and Cocoa Enterprises Corp. (Cocoa) is the respondent. On July 3, 1996 INS filed a complaint in six counts with the Office of the Chief Administrative Hearing Officer (OCAHO) based upon a request for hearing dated April 4, 1996 made on behalf of respondent by its attorneys Dongsung Lim, P.C., through Edward J. Tighe, Esquire. A request for hearing signed by an attorney is considered a notice of appearance on behalf of the respondent under OCAHO rules.'

A Notice of Hearing, together with a copy of the complaint and transmittal letter was mailed to respondent's attorney, Edward J. Tighe, as well as to respondent itself. Service was evidently declined initially by respondent's attorney because the Notice of Hearing package was returned to OCAHO marked "unclaimed." The copy sent to respondent itself at the address given in the complaint was returned marked "moved, not forwarded."

Based on subsequent information furnished by INS that respondent had a new attorney, service was then effected upon the alleged new attorney, Sangwook Moh, 330 7th Avenue, Suite 1500, New York, New York 10001 on October 18, 1996. In the absence of an answer, a Motion for Default Judgment was filed and an Order to Show Cause was issued on December 26, 1996, a copy of which was sent to Edward J. Tighe, who was still the attorney of record. Although a

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Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996). The particular provision Governing appearances is 28 C.F.R. § 68.33(b)(5).

signed return receipt card was also received for Cocoa's copy, the envelope containing the order was nevertheless returned to this office.

No entry of appearance was ever filed by the alleged new attorney, and on January 8, 1997, a letter was received from a legal assistant at Mr. Tighe's firm stating only, "We repeat one more time we do not represent Cocoa Enterprises with respect to the above-referenced matter. Cocoa Enterprises Corp. has informed us that it has hired another attorney." Mr. Tighe was notified that he remained the attorney of record until such time as he filed a Motion to Withdraw and that Motion was granted. Complainant filed a motion on January 14, 1997 to amend the complaint to dismiss Counts I and II, together with an amended complaint. No response was made to this motion and it was ~ranted on January 24, 1997.

The order was thereafter served on the attorney of record, Edward J. Tighe, together with a copy of the amended complaint. The return receipt card shows delivery to have been made on February 4, 1997. No answer has been filed to the amended complaint.

Respondent's Counsel's Motion to Withdraw

Presently pending is the motion of Edward J. Tighe, filed February 26, 1997, to permit Dongsung Lim P.C. to withdraw as attorneys for respondent. As grounds for this motion counsel states that Cocoa Enterprises Corp. by its president, Kyung Soo Lee, has informed the firm that its services are no longer desired and that Cocoa will not pay for any services. Counsel further requests that respondent be given a reasonable amount of time to retain new counsel if it so desires. Complainant has filed no response to this motion.

Ordinarily under such circumstance, I would invite a response by respondent Cocoa and allow additional time for respondent to obtain other counsel. Review of the proceedings in this case persuades me that this would be fruitless because Cocoa has furnished this office with no alternative address and mail sent to Cocoa is simply returned to this office. Interestingly, the certificate of service attached to counsel's motion shows that Cocoa's address is 330 7th Avenue, Suite 1500, New York, New York 10001; this is the same address as that from which previous communications from this office to Cocoa (including one for which a return receipt was received) have been returned, as well as the same address at which service was previously made upon Sangwook Moh, reportedly respondent's successor attorney who never entered an appearance.

2 The reference to "one more time" is unelaborated. No previous communication from respondent's counsel had been received by this office.

Discussion

OCAHO rules provide that withdrawal or substitution of an attomey maY be permitted by the administrative law judge upon written motion, 28 C.F.R. 68.33(c) (emphasis added), but provide no guidance as to the standards to be applied in deciding when particular circumstances warrant granting leave to withdraw. OCAHO caselaw however suggests that where an attomey has actually been discharged by his client, it may be inappropriate to deny such a motion. United States v. Ortiz, 6 OCAHO 904, at 4-5 (1996), United States v. Jacque, 6 OCAHO 823, at 5 (1995).

The principal concem in assessing such a motion is that the respondent's attomey is frequently the only person authorized to accept service and there is no other address where service may be had. That is the circumstance in this case. As pointed out in Ortiz, 6 OCAHO 904, at 5, however, OCAHO rules provide that once service of the complaint has been completed, service of subsequent orders and decisions may be made by mailing to the last known address of an unrepresented party, 28 C.F.R. 68.3(a)(3) and 68.6(a)(1996). Accordingly, it was found in that case that no useful purpose would be achieved by denying the motion where caselaw, the Rules of Professional Conduct, and common sense dictated that it should be granted. Ortiz, 6 OCAHO 904, at 5 (1996). The instant case is in a similar posture and counsel will not be compelled to continue representation of an unwilling client.

II. RESPONDENT IS IN DEFAULT

Failure of a respondent to answer a complaint constitutes a basis for the entry of a default judgment. 28 C.F.R. 68.9(b). That rule provides that failure of a respondent to answer shall be deemed to constitute a waiver of its right to appear and contest the allegations of the complaint. Id. (emphasis added). The administrative law judge may thereafter enter a judgment by default. Id..

A respondent such as Cocoa is not at liberty to file a request for hearing and then to do no more. Having initiated the process, a respondent which elects to keep opposing counsel and this office ignorant of its preferred address or which simply declines to receive mail, and then discharges its own attomey, will not be heard to complain of the consequences of a default judgment.

Default judgments are not generally favored in the law,3 and should be used only where the inaction of a party causes the case to come to a halt. United States v. R&M Fashion~ Inc., 6

3 But see Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1224 (7th Cir. 1991): "For a long time courts were reluctant to enter default judgments, and appellate courts were reluctant to sustain those that were entered. Courts emphasized that litigants are entitled to decisions on the merits. and that default is a harsh sanction. Those times are ~one."

OCAHO 826, at 2 (1995) (citing H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970)). The purpose of a default judgment both historically and in contemporary practice is to protect a diligent party from delay caused by an essentially unresponsive party. See generally 10 C. Wright, A. Miller, and M.K. Kane, Federal Practice and Procedure 2681 (2d ed. 1983 and Supp. 1995). That purpose is well served by a default judgment here. Accordingly, I accept as true all the factual allegations of the amended complaint and find that a default judgment should issue.

III. FINDINGS~ CONCLUSIONS. AND ORDER

A. FINDINGS

Count I

1. The respondent hired the following eleven (11) individuals for employment in United States after November 6, 1986:

1. John Aikins
2. Hyo Chol An
3. Soon Cha
4. Pascual Del Valle
5. Rafael Gonzalez
6. Chang Hong
7. Manuel Monegro
8. Oswaldo Morales
9. Smart Osafo
10. Franklin Safo
11. Daniel Vargas

2. The respondent failed to ensure that the eleven individuals listed properly completed section of the Form I-9, and itself failed to properly complete section 2 of the Form I-9 for them.

Count II

The respondent hired Jose Cupeles for employment in the United States after November 6, 1986, and failed to ensure that he properly completed section 1 ofthe Form I-9.

Count III

1. The respondent hired the following nine (9) individuals for employment in the United States after November 6, 1986:

1. Enudio Guzman
2. Jose Hernandez
3. Manuel Madera
4. Carlos Ovellano
5. Rene Quiles
6. Philip Rios
7. Francisco Rivera
8. Urbano Santiago
9. Harry Torres

2. The respondent failed to properly complete section 2 of the Form I-9 for the nine named individuals.

Count IV

1. The respondent hired Franklin Safo for employment in the United States after November 6, 1986, and failed to update Forms I-9 to reflect he was still authorized to work in the United States.

CONCLUSIONS

1. The findings in Count I constitute eleven (11) separate violations of 8 U.S.C. 1324c (a)(l)(B).

2. The findings in Count II constitute a violation of 8 U.S.C. 1324a(a)(1)(B).

3. The findings in Count III constitute nine (9) separate violations of 8 U.S.C. 1324a(a)(1)(B)

4. The findings in Count IV constitute a violation of 1324a(a)(1)(B).

PENALTIES

Respondent is ordered to pay the following civil money penalties:

1. The penalty for Count I is $3,465.00, $315.00 for each violation.

2. The penalty for Count II is $200.00.

3. The penalty for Count III is $2,475.00, $275.00 for each violation.

4. The penalty for Count IV is $300.00.

The penalties total $6,440.00 for all four counts.

SO ORDERED.

Dated and entered this 8th day of April, 1997.

Ellen K. Thomas
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Of ficer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. 1324a(e)(7) and (8), and 28 C.F.R. 68.53.